A

Songsil Udtoom & Ors v Public Prosecutor

B COURT OF APPEAL (PUTRAJAYA) — CRIMINAL TRIAL NOS B-05–66, 67, 68 AND 69–03 OF 2013
MOHTARUDIN BAKI, TENGKU MAIMUN, AHMADI ASNAWI JJCA
2 OCTOBER 2015

C *Criminal Procedure — Appeal — Appeal against conviction and sentence — Whether prosecution proven charges against each and every appellant — Whether prosecution distinguished individual acts of each appellant in commission of offence — Whether there was sufficient evidence to link firearms and bullets to appellants — Whether absence of any direct or corroborative*
D *evidence in terms of DNA findings, fingerprint impressions or CCTV recordings fatal to prosecution case — Whether trial judge's failure to address these issues constituted violation of s 182A(1) Criminal Procedure Code and amounted to a misdirection — Whether findings of trial judge should have been followed by*
E *amendments to two charges against appellants — Whether trial judge adequately considered appellants' defence*

Criminal Law — Penal Code — s 34 — Common intention — Absence of s 34 in charges — Whether absence meant prosecution should prove charges on
F *each and every appellant — Whether absence made charges defective*

Acting on information received a police team raided a hotel room in the Pyramid Tower Hotel. When the police team managed to gain entry into the hotel room, the first and third appellants had reached for a pistol, but the police
G officers from the raiding team had managed to subdue and detain them. The other two appellants, namely the second and fourth appellants, who were also occupying the same hotel room were also detained. The hotel room occupied by the four appellants, who were all Thai nationals, was searched and the police team recovered six firearms of various types and 336 pieces of bullets of various
H types. The four appellants were arrested and charged with unlawful possession of six firearms (the first charge) and 336 pieces of bullets (the second charge). At the close of the prosecution case, which primarily dealt with how the police raiding team had recovered the various types of firearms and bullets from the room occupied by the four appellants, the trial judge found that the four
I appellants were in unlawful possession or custody of the firearms and bullets and called upon them to enter their defence. The four appellants shared a common defence, which was that they had come to Malaysia for sightseeing together with one Somlit and three others and that they had gone their separate ways but had reunited in the late afternoon when Somlit had requested for the

key card of their hotel room so as to put some bags in their hotel room. Somlit had then left the bags in the hotel room before leaving with his friends. The appellants also claimed that the some of the bags, including the bags containing the firearms and bullets were not theirs but Somlit's. In their defence the appellants also claimed that the firearms were in the bags but that the police officers had taken them out of the bags and placed them on the tables. The trial judge found that the defence had failed to raise any reasonable doubt on the prosecution's case and that the four appellants were in unlawful custody and possession of two of the firearms and of 129 bullets found. As such, the four appellants were convicted of both the charges and sentenced to death. Hence the present appeal against the convictions and sentences. The appellants submitted that the absence of s 34 of the Penal Code in the charges against them meant that the prosecution had to prove the charges against each and every appellant, which the prosecution had failed to do. The appellants further submitted that there was no evidence either direct or corroborative in terms of DNA findings, fingerprint impressions or CCTV recordings to link the firearms and bullets to each and every appellant. The appellants also argued that the trial judge had not adequately considered their defence.

Held, allowing the appeal:

(1) The two charges preferred against the appellants alluded to '… telah ada dalam milik kamu bersama …' which literally means they were in joint possession of the same. This was a great departure from s 34 of the Penal Code where each accused person would be liable for that act in the same manner as if the act was done by him alone. Hence, in such event it was imperative that the prosecution should prove the charges against each and every appellant (see paras 22–23).

(2) Having perused the evidence it was clear that the prosecution had failed to prove that each and every appellant was in possession of the firearms and bullets specified in the charges apart from showing that all the four appellants slept in the same room and were arrested in the same room where the firearms and bullets were recovered. However, the factum of sleeping together in the same room and getting arrested together in the same room did not indicate which one of the four or that all four of them had the care and management of the hotel room, as there was no evidence that they were acting in concert with each other. The prosecution evidence showed that two of the six firearms were discovered next to the first and third appellants, while the four other firearms were recovered from a bag. However, the prosecution had failed to show who had committed the offence in respect of each of the firearms. The prosecution also failed to prove exactly what part was played by each of the four appellants and also failed to distinguish the individual acts of each of the appellants in the commission of the offence. Further, since they were not charged under s 34 of the Penal Code, none of the appellants would be

A equally liable for the act of unlawful possession of the firearms and bullets as if the act were done by him alone (see paras 24–25).

(3) The prosecution had failed to establish that the appellants had some knowledge that an act had been committed which was consistent with the furtherance of the common intention or would be in furtherance of the common intention. Neither had the prosecution established that there was a pre-arranged plan to commit the criminal act of having unlawful possession of the firearms and bullets and that the said act was done in concert to that pre-arranged plan (see paras 28–29).

(4) There was no evidence to link the firearms and bullets to any of the appellants. There were neither fingerprint impressions lifted from the firearms recovered, nor DNA investigations conducted to link the firearms to the appellants. Although there were CCTV cameras on every floor of the hotel the appellants were staying, the investigating officer had not investigated the camera recordings to determine the truth of the appellants' claim that Somlit and his friends had deposited the bags in the hotel room. The trial judge had also failed to address these issues, which constituted a violation of s 182A(1) of the CPC and amounted to a misdirection. (see paras 30–34 & 40–41).

(5) The trial judge had found the four appellants to be in unlawful custody and possession of two of the firearms but made no finding at all regarding the four other firearms that formed the subject of the first charge. The same was true in respect of the second charge wherein the trial judge found the appellants guilty of having unlawful possession of 129 bullets when the charge alluded to 336 bullets of various types. The fact that no consequential amendments were made to the charges despite these findings was alone most prejudicial to the defence. Thus, at highest what had been proven was mere proximity of the incriminating exhibits with the appellants. Mere proximity in the absence of incriminating evidence did not amount to possession (see paras 35–37).

(6) The trail judge had failed to consider the appellants' defence. In her grounds of judgment the trial judge had failed to make any findings as to whether Somlit and his friends were real or otherwise and if Somlit and his friends did exist and the role played by them. In the circumstances, the convictions were unsafe and ought to be set aside (see paras 38–39 & 42).

[Bahasa Malaysia summary

Bertindak atas maklumat yang diterima sepasukan polis telah menyerbu bilik hotel di Hotel Pyramid Tower. Apabila pasukan polis berjaya masuk ke dalam bilik hotel itu, perayu-perayu pertama dan ketiga telah mencapai pistol, tetapi pegawai polis daripada pasukan serbuan telah berjaya menguasai dan menahan mereka. Dua perayu lain, iaitu perayu-perayu kedua dan keempat, yang juga

mendiami bilik hotel yang sama juga telah ditahan. Bilik hotel yang didiami oleh keempat-empat perayu, yang kesemuanya warganegara Thai, telah diperiksa dan pasukan polis menemui enam senjata api pelbagai jenis dan 335 butir peluru pelbagai jenis. Keempat-empat perayu telah ditangkap dan dituduh kerana memiliki enam senjata api secara tidak sah ('pertuduhan pertama') dan 336 butir peluru ('pertuduhan kedua'). Di penutup kes pendakwaan, yang mengendalikan khususnya dengan cara bagaimana pasukan serbuan polis menemui pelbagai jenis senjata api dan peluru dari bilik yang didiami oleh keempat-empat perayu, hakim perbicaraan mendapati bahawa keempat-empat perayu mempunyai milikan atau jagaan tidak sah senjata api dan peluru dan memanggil mereka memasukkan pembelaan mereka. Keempat-empat perayu berkongsi pembelaan yang sama, iaitu mereka telah datang ke Malaysia untuk berjalan-jalan bersama Somlit dan tiga orang lain dan bahawa mereka telah pergi berjalan-jalan secara berasingan tetapi bertemu semula lewat tengah hari apabila Somlit meminta kad kunci bilik hotel mereka untuk meletakkan beberapa bagasi dalam bilik hotel mereka. Somlit kemudian telah menginggalkan bagasi itu dalam bilik hotel itu sebelum meninggalkan kawan-kawannya. Perayu-perayu juga mendakwa bahawa beberapa bagasi itu, termasuk bagasi mengandungi senjata api dan peluru itu bukan milik mereka tetapi Somlit. Dalam pembelaan mereka perayu-perayu juga mendakwa bahawa senjata api itu dalam bagasi tetapi pegawai polis telah mengeluarkannya daripada bagasi dan meletakkan senjata api itu atas meja. Hakim perbicaraan mendapati pembelaan telah gagal untuk menimbulkan apa-apa keraguan munasabah atas kes pendakwaan dan keempat-empat perayu berada dalam milikan dan jagaan tidak sah dua senjata api dan 129 peluru yang ditemui. Oleh itu, keempat-empat perayu telah disabitkan untuk kedua-dua pertuduhan dan dihukum mati. Justeru rayuan ini terhadap sabitan dan hukuman tersbeut. Perayu-perayu berhujah bahawa ketiadaan s 34 Kanun Keseksaan dalam pertuduhan-pertuduhan terhadap mereka bermaksud pendakwaan perlu membuktikan pertuduhan-pertuduhan terhadap setiap dan kesemua perayu, yang mana pendakwaan telah gagal berbuat demikian. Perayu-perayu selanjutnya telah berhujah bahawa tiada keterangan sama ada secara langsung atau menyokong dari segi penemuan DNA, kesan cap jari atau rakaman CCTV untuk mengaitkan senjata api dan peluru kepada setiap dan kesemua perayu. Perayu-perayu juga berhujah bahawa hakim perbicaraan tidak mempertimbangkan sewajarnya pembelaan mereka.

Diputuskan, menolak rayuan:

(1) Kedua-dua pertuduhan yang dibuat terhadap perayu-perayu merujuk kepada '... telah ada dalam milik kamu bersama ...' yang mana secara harfiah bermaksud mereka mempunyai milikan bersama. Ini menyimpang jauh daripada s 34 Kanun Keseksaan di mana setiap tertuduh adalah bertanggungjawab untuk perbuatan dalam cara yang sama seperti perbuatan itu dilakukan olehnya sahaja. Justeru, dalam

setiap kejadian ia adalah penting untuk pendakwaan membuktikan pertuduhan-pertuduhan terhadap setiap dan semua perayu (lihat perenggan 22–23).

(2) Setelah meneliti keterangan ia adalah jelas bahawa pendakwaan telah gagal membuktikan yang setiap dan semua perayu mempunyai milikan senjata dan peluru dalam pertuduhan-pertuduhan selain daripada menunjukkan bahawa kesemua empat perayu tidur dalam bilik sama dan telah ditangkap dalam bilik sama di mana senjata api dan peluru telah ditemui. Walau bagaimanapun, faktum tidur bersama dalam bilik yang sama dan ditangkap bersama dalam bilik yang sama tidak menunjukkan mana satu di antara keempat-empat mereka telah menjaga dan menguruskan bilik hotel, kerana tiada keterangan bahawa mereka bertindak bersama antara satu sama lain. Keterangan pendakwaan menunjukkan bahawa dua daripada enam senjata api telah ditemui sebelah perayu-perayu pertama dan ketiga, manakala empat senjata api lain telah ditemui daripada sebuah bagasi. Walau bagaimanapun, pendakwaan telah gagal menunjukkan siapa yang melakukan kesalahan berkaitan setiap senjata api itu. Pendakwaan juga gagal membuktikan sebenarnya bahagian yang dimainkan oleh setiap empat perayu dan juga gagal membeza tindakan individu setiap perayua dalam perlakuan kesalahan. Selanjutnya, oleh kerana mereka tidak dituduh di bawah s 34 Kanun Keseksaan, tiada antara perayu yang bertanggungjawab untuk perbuatan tidak sah miliki senjata api dan peluru seolah-olah perbuatan itu dilakukan olehnya sendiri (lihat perenggan 24–25).

(3) Pendakwaan telah gagal untuk membuktikan bahawa perayu-perayu mempunyai pengetahuan yang perbuatan telah dilakukan konsisten lanjutan niat bersama atau akibat lanjutan niat bersama pendakwaan tidak membuktikan bahawa rancangan yang telah diatur terlebih dahulu untuk melakukan perbuatan jenayah memilik senjata api dan peluru yang menyalahi undang-undang dan bahawa perbuatan tersebut telah dilakukan bersama dengan rancangan yang telah diatur terlebih dahulu (lihat perenggan 28–29).

(4) Tiada keterangan untuk mengaitkan senjata api dan peluru itu terhadap mana-mana perayu. Tiada kesan cap jari yang diperoleh daripada senjata api yang ditemui itu, mahupun siasatan DNA dijalankan untuk mengaitkan senjata api itu dengan perayu-perayu. Walaupun terdapat kamera CCTV di setiap tingkat hotel yang didiami perayu-perayu, pegawai penyiasat tidak memeriksa rakaman kamera untuk menentukan kebenaran dakwaan perayu-perayu bahawa Somlit dan kawan-kawannya telah memasukkan bagasi dalam bilik hotel itu. Hakim perbicaraan juga telah gagal mengemukakan isu-isu tersebut, yang merupakan pelanggaran s 182A(1) Kanun Tatacara Jenayah dan merupakan salah arah (lihat perenggan 30–34 & 40–41).

(5) Hakim perbicaraan mendapati keempat-empat perayu dalam jagaan dan milikan yang menyalahi undang-undang dua senjata api tetapi tidak membuat penemuan langsung berkenaan empat senjata api lain yang menjadi subjek pertuduhan pertama. Yang sama adalah benar berkaitan pertuduhan kedua di mana hakim perbicaraan mendapati perayu-perayu bersalah kerana memilik 129 peluru yang menyalahi undang-undang apabila pertuduhan merujuk kepada 336 peluru pelbagai jenis. Fakta bahawa tiada pindaan berbangkit telah dibuat terhadap pertuduhan-pertuduhan itu meskipun penemuan tersebut sendiri bersifat prejudis terhadap pembelaan. Oleh itu, paling tidak apa yang telah dibuktikan hanya berkaitan ekshibit yang menuduh perayu. Kaitan semata-mata tanpa keterangan yang menuduh bukanlah milikan (lihat perenggan 35–37).

(6) Hakim perbicaraan telah gagal mempertimbangkan pembelaan perayu-perayu. Berdasarkan alasan penghakiman beliau hakim perbicaraan gagal untuk membuat apa-apa penemuan tentang sama ada Somlit dan kawan-kawannya adalah benar atau sebaliknya dan jika Somlit dan kawan-kawannya wujud dan memainkan peranan mereka. Dalam keadaan itu, sabitan-sabitan tidak selamat dan patut diketepikan (lihat perenggan 38–39 & 42).]

Notes

For cases on appeal against conviction and sentence, see 5(1) *Mallal's Digest* (5th Ed, 2015) paras 301–419.
For cases on s 34, see 4(2) *Mallal's Digest* (5th Ed, 2015) paras 2358–2387.

Cases referred to

PP v Aris Yunos [1989] 2 CLJ Rep 289, HC (refd)
R v Abbot [1955] 2 All ER 899 (refd)

Legislation referred to

Criminal Procedure Code ss 153, 182A(1), 422
Penal Code s 34

Appeal from: Criminal Trial Nos 45–59 of 2007 and 45–60 of 2007 (High Court, Shah Alam)

M Visvanathan (Saibullah V Nathan & Co) for the first and third appellants.
Sreekant Pillai (Sreekant Pillai) for the second and fourth appellants.
Nahra bt Dollah (Iskandar Mohd with him) (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Ahmadi Asnawi JCA:

[1] In the court below two charges were levelled against all the four appellants. The first charge reads:

> Bahawa kamu semua pada 4 Februari 2007 jam lebih kurang 3.45 pagi di bilik No. 6104, Pyramid Tower Hotel, Bandar Sunway, Subang Jaya di dalam Daerah Petaling, di dalam Negeri Selangor Darul Ehsan, iaitu satu kawasan keselamatan sepertimana yang diisytiharkan oleh Yang di Pertuan Agong mengikut Pengistiharkan No. P.U.(A)148 bertarikh 15 Mei 1969 tanpa sebab yang sah telah ada dalam milik kamu bersama:
>
> (a) Sepucuk pistol Colt MK IV Siri 80, No. siri SS13023;
>
> (b) Sepucuk rifel AR 15, No. Siri 960442;
>
> (c) Sepucuk pistol Colt, No. Siri 111099;
>
> (d) Sepucuk pistol Remington Rand Inc;
>
> (e) Sepucuk pistol Sig Sauer No. Siri B33964; dan
>
> (f) Sepucuk pistol Glock, No. Siri GFH 122
>
> tanpa apa-apa kuasa yang sah dan oleh yang demikian kamu melakukan satu kesalahan yang boleh dihukum di bawah seksyen 57(1)(a), Akta Keselamatan Dalam Negeri, 1960.

The second charge reads:

> Bahawa kamu semua pada 4 Februari 2007 jam lebih kurang 3.45 pagi di bilik No. 6104, Pyramid Tower Hotel, Bandar Sunway, Subang Jaya di dalam Daerah Petaling, di dalam Negeri Selangor Darul Ehsan, iaitu satu kawasan keselamatan sepertimana yang diisytiharkan oleh Yang di Pertuan Agong mengikut Pengisytiharan No. P.U.(A)148 bertarikh 15 Mei 1969 tanpa sebab yang sah telah ada dalam milik kamu bersama sebanyak 336 butir peluru pelbagai jenis tanpa apa-apa kuasa yang sah dan oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 57(1)(b) Akta Keselamatan Dalam Negeri, 1960.

[2] At the end of the trial all the four appellants were convicted of both the charges and sentenced to death. Hence these appeals before us against the said convictions and sentences.

THE CASE FOR THE PROSECUTION

[3] On 4 February 2007 at about 3.45am, acting upon information received, SP15 (Supt Azman bin Ayob) and his team raided room No 6104, Pyramid Tower Hotel, Bandar Sunway, Subang Jaya. With the assistance of SP7 (Rosli bin Mohd Hassan) the assistant security manager of the hotel, they

managed to neutralise the security lock of the door to the room. The door was further locked from inside. SP8 (S/Mejar Abu Hashim) kicked the door and had the door opened. The entire police team then rushed into the room.

[4] SP9 (Insp Rajenderan a/l Y Kandiah) saw the third appellant raising from the sofa he was seated and tried to grab a pistol on the make-up table (table 'A' in sketch plan exh P158). However SP9 managed to subdue the third appellant with the assistance of a member of the team after a brief struggle.

[5] Meanwhile SP10 (D/Sjn Mejar Sukdarshan Singh) saw the first appellant trying to grab a pistol on a small table placed between the two beds in the room (table 'B' in same sketch plan). Nevertheless he was also subdued and detained.

[6] SP11 (D/Corp Malatambi a/l Vadivelu) managed to detain the second appellant while on bed and the fourth appellant was arrested by SP13 (D/Sjn Chong Teck Fatt).

[7] Upon full investigation of the room, the police recovered:

(a) one Glock pistol, bearing serial no GFH122 on the table marked 'A' in the said sketch plan together with one long magazine containing 17 bullets and two short magazines containing 11 bullets each (marked exhs P8B, P8C, P8D and P8E respectively). There were altogether 39 pieces of 9mm Louger .45 auto bullets.

(b) one Colt pistol MK IV bearing serial no SS13023 on the table marked 'B' in the same sketch plan together with one long magazine containing ten bullets and one short magazine containing eight bullets (marked P9B, P9C and P9D respectively. There were altogether 18 pieces 9mm bullets.

(c) one black beg carrying the 'Bilabong' brand name containing, amongst others:

(i) one dismantled Colt AR15 raifel with the serial no 960442;

(ii) Remington Rand Inc pistol wherein its serial number has been erased together with an empty magazine;

(iii) Colt pistol carrying the serial no 111099 with an empty magazine; and

(iv) a white 'Nike' sock containing 64 pieces of WW6RA, 106 pieces of Louger, ten pieces of ACP97 .45 auto, 28 pieces of RP.45 auto 96 and 23 pieces of PSP83 bullets.

(d) one black bag with light blue stripes carrying the 'Honda' brand name containing amongst others, one Sig Sauer pistol bearing the serial number B111964 together with two magazines containing 13 pieces 9mm bullets; and

(e) there were at least five other bags seized from the room containing, amongst others clothes and jewelleries.

FINDINGS OF TRIAL JUDGE AT END OF THE PROSECUTION'S CASE

[8] The learned judge found that all the four appellants were in unlawful possession or custody of the Colt pistol marked P9B together with the magazine marked P9C containing ten pieces of .45 auto 96 bullets and the magazine marked P9D containing eight pieces of bullets (on the table marked 'B') and the Glock pistol marked P8B together with the magazine marked P8C containing 17 pieces of bullets and two other magazines containing 11 pieces of bullets each and marked P8D and P8E respectively (on the table marked 'A'). The learned judge also found that the location where the said firearms and bullets were found were within the security area as declared by DYMM Yang di Pertuan Agong vide PU(A)148 dated 15 May 1969.

[9] The learned judge concluded:

> Bagi pertuduhan pertama pihak pendakwaan telah berjaya mengemukakan kes prima facie terhadap kesemua OKT bagi kesalahan seperti mana dalam pertuduhan kerana memiliki:
>
> (a) Sepucuk pistol Colt MK IV Siri 80, nombor siri SS 13023;
>
> (b) Sepucuk pistol Glock, nombor siri GFH122.
>
> Bagi pertuduhan kedua pihak pendakwaan telah berjaya mengemukakan kes prima facie terhadap kesemua OKT bagi kesalahan tersebut kerana memiliki 39 butir peluru 9 mm Luger dan 18 butir peluru .45 Auto 96.
>
> Dengan itu mahkamah telah memanggil keempat-empat OKT untuk mengemukakan pembelaan mereka atas pertuduhan tersebut seperti di atas.

THE DEFENCE CASE

[10] All the four appellants shared a common defence. The first, second and fourth appellant are Thai nationals and came to Malaysia for a sight seeing tour together with three others namely Weeraphong, Somlit and Vinai. Their first destination was Kuala Terengganu where they met the third appellant there. Meanwhile Somlit and the two others proceeded to Kuala Lumpur.

[11] On 1 February 2007 they went to Kuala Lumpur and met Somlit at Mandarin Court Hotel and put the night at the said hotel. On 2 February 2007

all four of them and Somlit changed their hotel and put up at Hotel Armada. On 3 February 2007 all the four appellants again shifted their hotel and now stayed at Sunway Lagoon Hotel. In the evening they shifted to Hotel Pyramid Tower and the room (No 6104) was registered under the fourth appellant's name. Next they went sight seeing and later met Somlit with three others at KFC Sunway.

[12] Somlit told them that they wanted to put several bags in their hotel room. The third appellant gave one of the keycards of their room to Somlit who then left with the three others who came with him. Thereafter all the four appellants went back to their hotel and retired to their room at about 12 midnight after spending time at the hotel's coffee-house.

[13] The first appellant woke up when he was pulled down from the bed in the room and denied that he had tried to grab the pistol lying on table 'B', placed between the two beds.

[14] The second appellant stated that the police placed the pistol on the tables in the room. The three other appellants also said that the police took the pistols from the bags and placed them on the tables.

[15] The third appellant denied that he had tried to grab the pistol placed on table 'A'. He passed out when he was hit on his head and regained consciousness only at the hospital. He denied signing the search list (exh P241) prepared by SP15 as at the material time he was alleged to have signed the same, he was already warded in the hospital.

[16] The fourth appellant said that the said room was registered in her name. However under cross-examination she admitted that the bill was paid by the third appellant as according to the third appellant, foreigners may be offerred a discount.

[17] All the four appellants denied having knowledge of the firearms and bullets found in the room. They also contended that some of the bags found in the room did not belong to them.

FINDING OF THE TRIAL JUDGE AT THE END OF THE DEFENCE CASE

[18] At the conclusion of the trial, the learned judge found that the defence posited by the appellants were mere denials. They were in full control and custody of the said room where the two firearms were found with the bullets. All the four appellants were arrested in the said room.

[19] She found that all four appellants were having unlawful custody and possession of the said two firearms and bullets and the location where the same were found were in a security area. The defence failed to raise any reasonable doubt upon the prosecution's case and concluded:

> Menimbangkan keterangan secara keseluruhannya daripada awal ke akhir kes didapati pihak pendakwaan berjaya membuktikan kesalahan (*guilt*) kesemua OKT tanpa keraguan yang munasabah. Tiada keraguan yang munasabah tentang pemilikan dan pengawalan oleh kesemua OKT ke atas pistol-pistol dan peluru-peluru seperti yang tersebut dalam pertuduhan-pertuduhan yang mana pembelaan dipanggil dalam kes ini. Sehubungan dengan itu OKT 1, 2, 3 dan 4 didapati bersalah dan disabitkan atas kesalahan-kesalahan bagi pertuduhan pertama memiliki:
>
> (a) Sepucuk pistol Colt MK IV Siri 80, nombor siri SS13023;
>
> (b) Sepucuk pistol Glock, nombor siri GFH 122
>
> dan pertuduhan kedua kerana memiliki 39 butir peluru 9 mm Luger dan 18 butir peluru .45 Auto 90.

THE APPEAL

[20] The appeals before us could broadly be grounded upon two grounds:

(a) the absence of s 34 of the Penal Code ('the PC') in the charges; and

(b) the appellants defence were not adequately considered.

The absence of s 34 of the Penal Code in the charges

[21] Learned counsels submitted that the absence of s 34 of the Penal Code ('the PC') in the charges against the appellants means that the prosecution must prove the charges on each and every appellant and not just prove on one appellant. There were also no evidence either direct or corroborative in terms of DNA findings, fingerprint impressions or CCTV recordings to link the firearms and bullets to each and every appellant.

[22] We were with the aforesaid submissions. The two charges alluded to '... telah ada dalam milik kamu bersama ...'. Literally translated it means they were in joint possession of the same, a far cry from the essence of s 34 of the PC where each of such person is liable for that act in the same manner as if the act is done by him alone. Hence in such event it is imperative that the prosecution must prove the charges against each and every appellant.

[23] Our attention was drawn to the case of *R v Abbot* which was referred to in *Public Prosecutor v Aris Yunos* [1989] 2 CLJ Rep 289 which we found to be on all fours with the issue presently before us. The relevant passage is worth reproducing:

The distinction is that in this case there were two persons in the house and there is no evidence as to which one of the two or both had the care or management of the premises. I drew the attention of the learned DPP to the case of *R v Abbot* [1955] 2 All ER 899 especially that part of the judgment as p 901 which reads:

> If two people are jointly indicted for the commission of a crime and the evidence does not point to one rather than the other, and there is no evidence that they were acting in concert, the Jury ought to return a verdict of not guilty against both because the prosecution have not proved the case. If in those circumstances it were left to the defendants to get out of it if they could, that would put the onus on the defendants to prove themselves not guilty. Pinnemore J remembers a case in which two sisters were indicted for murder and there was evidence that they had both been in the room at the time when the murder of the boy was committed: but the prosecution could not show that sister A had committed the offence or that sister B had committed the offence. Very likely one or the other must have committed it, but there was no evidence which and although it is unfortunate that a guilty party cannot be brought to justice, it is far more important that there should not be a miscarriage of justice and that the law should be maintained that the prosecution should prove the case.

[24] Having perused through the evidence, we were again with learned counsels that the prosecution has failed to prove that each and every appellant were in possession of the said firearms and bullets apart from showing that all the four appellants slept and were arrested in the same room where the firearms and bullets were recovered. However, we opined that the factum of sleeping together in the same room and got arrested together in the same room does not indicate which one of the four or that all the four of them had the care and management of the said room as there is no evidence that they were acting in concert with each other.

[25] The Glock pistol (exh P8B) was said to have been recovered from table 'A' and the Colt pistol (exh P9B) was recovered from table 'B' and the four other firearms were recovered from the 'Bilabong' bag. But the prosecution could not and has failed to show who had committed the offence in respect of each of the firearms. Very likely one or the other three or any one of the four or all four of them must have possession of the said firearms but there was no evidence as to which one of the four or that all the four appellants had possession of each of the same. The prosecution failed to prove exactly what part was taken or played by each of the four appellants. Additionally the prosecution failed to distinguish the individual acts of each of the appellants in the commission of the offence. Equally there is no evidence that they were acting in concert and since they were not charged in furtherance of the common intention of all under s 34 of the PC, it means that none of the appellants would equally be liable for the act of any one of them as if the act (of unlawful possession) were done by him alone, notwithstanding that it was the other person(s) who actually committed the offence. The same is equally true in respect of the

possession of the bullets recovered from the same room.

[26] The learned deputy public prosecutor ('DPP') implored upon us that the wording 'telah ada dalam milikan kamu' gave the appellants sufficient notice that they were charged for having joint possession of the said firearms and bullets. The absence of the word 's 34' in the charges does not make the charges defective. It is merely an irregularity under s 153 of the Criminal Procedure Code and is curable under s 422 of the same. It is neither a substantive evidence but only a rule of evidence.

[27] The learned DPP went on to submit that on the evidence as adduced, the prosecution had indeed proven that the appellants have joint possession of the said firearms and bullets in furtherance of the common intention of them all, notwithstanding the absence of s 34 of the PC.

[28] The existence of common intention is a question of fact and it may be proved by direct evidence or by way of inferences from the circumstances of the case or upon proved facts. Having perused the evidence, we opined that the evidence does not support the existence of common intention of them all to commit the offence. Apart from the fact that the appellants were arrested together in the said room, there is a dearth of evidence to link them with the commission of the crime in furtherance of the common intention. The prosecution failed to establish that the appellants have some knowledge that an act may be committed which is consistent with the furtherance of the common intention or would be in furtherance of the common intention.

[29] The prosecution must also establish that there was a pre-arranged plan to commit the criminal act of having unlawful possession of the firearms and bullets and the said act was done in concert to that pre-arranged plan. Such planning could develop on the spot or in the course of the commission of the offence. However, we found none of these either through direct evidence or by way of inferences from the circumstances of the case. Being together in the same room without more can hardly be said to constitute a pre-arranged plan.

Evidence to link the four appellants with the firearms and bullets/ammunition

[30] We further found that there is no evidence to link the firearms (in first charge) and bullets (in second charge) to any of the appellants.

[31] Finger print impressions were not lifted from the firearms recovered from the Bilabong bag and the pistols recovered from table 'A' and table 'B'.

[32] No DNA investigation was done to link the firearms in the Bilabong bag and the pistols to the appellants. The chemist report (at p 1003 Vol 8 ROA)

was silent in respect of this investigation. Interestingly the chemist report reveal that the DNA of other persons were found on other articles.

[33] SP12, the security manager of the hotel testified that every floor of the hotel has a CCTV camera and the recordings would be preserved for at least two weeks. However the IO did not ask from SP12 the CCTV recording for the sixth floor where room No 6104 was located. If the CCTV recordings were investigated it may show which appellant had carried/in possession of which bag in particular the Bilabong bag which contained at least four firearms and the bullets. It would also show the truth or falsity of the appellants' claim that Somlit and his friends had also deposited several bags in the said room. This would settle once and for all the issue whether the bags, its contents and the firearms and bullets found therein belonged to the appellants. Additionally the photographs extracted in the lift do not show any of the appellants carrying any bag that resembles the billabong bag containing the firearms.

[34] The issues enumerated above were not addressed by the learned judge. Had she done so, she would have found that there is no evidence to link the said firearms and bullets to the appellants apart from the fact that they were caught sleeping together in the said room.

The two pistols and 57 bullets in the findings of the learned judge

[35] The first charge alluded to six firearms of various types and the second charge referred to 336 pieces of bullets, also of various types. But the learned judge found all the four appellants guilty of having unlawful possession only in respect of two pistols (exhs P8B and P9B). She made no finding at all regarding the four other firearms when pronouncing her prima facie findings and also when convicting the four appellants at the end of the defence case. The same is true in respect of the second charge wherein she found all the four appellants guilty of having unlawful possession of 39 pieces of 9mm bullets and 18 pieces of .45 Auto 90 bullets when the charge alluded to 336 bullets of various types. No consequential amendments to the charges were instituted by the learned judge though to reflect her findings. This alone is most prejudicial to the defence.

[36] Thus it begs the question as to the remaining four other firearms and bullets. The learned judge failed to address this issue. If the learned judge was of the view that there is no evidence to link the four appellants with the four other firearms and the remaining bullets, then what is the basis of her findings of unlawful possession in respect of the two pistols (exhs P8B and P9B) and the 57 bullets (39 + 18) given that the circumstances under which all the firearms and bullets were recovered were the same.

[37] We opined that at the highest what has been proven were mere proximity of the incriminating exhibits with the four appellants. Mere proximity in the absence of compelling, incriminating evidence does not amount to possession. The evidence as it were, does not disclose any link of any of the firearms or the bullets to any of the appellants, including the two pistols and bullets alluded to by the learned judge in her findings.

None consideration of the appellants' defence

[38] The defence posited that they came to Malaysia with Somlit and three others. They went separate ways and somewhere in between they reunited. In late afternoon on 3 February 2007 they met Somlit with three others at KFC Sunway wherein Somlit told them that they wanted to put several bags in their hotel room. The third appellant then gave one of the key cards of their room to Somlit who then left the scene with his friends. They claimed that some of the bags and the bag containing the firearms and bullets were not theirs but Somlit's. The pistols on the tables were in the said bag and the police took it out and placed the same on the tables.

[39] It is apparent that in her grounds of judgment the learned judge did not touch this aspect of the defence at all. There was no evaluation and equally she did not make any findings whether Somlit and his friends were real or otherwise and if Somlit and his friends do exist, the role played by them.

[40] The learned judge also did not consider that no fingerprint impressions were lifted from the firearms and the bullets. The learned judge also did not take into account that no DNA investigation was done on the firearms. Equally not considered was the fact there were CCTV recordings on each of the hotel floor and these CCTV recordings, in particular on the sixth. Floor, were never investigated by the IO of the case. The learned judge also did not consider that two key cards of the room were issued to the third appellant but only one key card was recovered and tendered in court, giving credence to the third appellant's testimony that he gave one of the cards to Somlit.

[41] In our view, the failure by the learned judge to evaluate and consider the above said issues posited by the defence is a violation of s 182A(1) of the Criminal Procedure Code which provides that at the conclusion of the trial, the court shall consider all the evidence adduced before it and shall decide whether the prosecution has proved its case beyond reasonable doubt. Clearly the learned judge failed to conduct this exercise in her decision to convict all the four appellants. This failure amounted to a misdirection.

CONCLUSION

[42] For all the reasons enumerated above, we opined that the convictions against all the four appellants were unsafe. Hence we allowed their appeals. We set aside their convictions and sentences and ordered them to be acquitted and discharged forthwith.

Appeal allowed.

Reported by Kohila Nesan